PUBLIC PROSECUTOR

v.

LEONG YING MING

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI HJ. ABDUL HAMID
BIN HJ. OMAR LP, TAN SRI DATUK
GUNN CHIT TUAN CJ (MALAYA),
DATO' EDGAR JOSEPH JR. SCJ
[SUPREME COURT CRIMINAL
APPEAL NO. 05-84-90]
21 JANUARY 1993

DANGEROUS DRUGS: Whether an offence under s. 39A(2) Dangerous Drugs Act 1952 is a bailable offence.

The respondent was charged for an offence under s. 39A(2) Dangerous Drugs Act 1952 (the Act). The respondent applied for bail which was refused by the Sessions Court Judge, he being of the view that the offence was not bailable under s. 41B of the Act. The respondent made an application for bail to the Kuantan High Court pursuant to s. 389 of the Criminal Procedure Code and the learned Judge allowed his application and granted bail. The Public Prosecutor appealed.

Held:
[1] An offence under s. 39A(2) of the Act clearly comes within the ban imposed by s. 4lB(l)(b) of the Act and therefore no bail can be granted in respect of such an offence.

[2] The offence for which the respondent was charged was not bailable under the specific provisions of the Act and the learned Judge should not have granted bail.

[Appeal allowed].

[**Bahasa Malaysia** Translation of Headnote]

DADAH BERBAHAYA: Sama ada suatu kesalahan di bawah a. 39A(2) Akta Dadah Berbahaya 1952 ialah suatu kesalahan boleh jamin.

Responden telah dituduh bagi suatu kesalahan di bawah s. 39A(2) Akta Dadah Berbahaya 1952. Responden memohon untukdiikat jamin yang mana telah ditolak oleh Hakim Mahkamah Sesyen, yang berpendapat bahawa kesalahan tersebut tidak boleh diikat jamin di bawah s. 41B Akta tersebut. Responden telah membuat permohonan bagi diikat jamin kepada Mahkamah Tinggi Kuantan menurut s. 389 Kanun Prosedur Jenayah dan Hakim yang bijaksana tersebut telah membenarkan permohonannya dan memberikan ikat jamin. Pendakwaraya telah membuat rayuan.

Diputuskan:
[1] Suatu kesalahan di bawah s. 39A(2) Akta tersebut jelas tergolong dalam lingkungan larangan yang dikenakan oleh s. 41B(l)(b) Akta tersebut dan oleh yang demikian tiada ikat jamin yang boleh diberikan berhubung dengan kesalahan yang sedemikian.

[2] Kesalahan bagi yang mana responden telah dituduh adalah tidak boleh diikat jamin di bawah peruntukan-peruntukan khusus Akta tersebut dan Hakim yang bijaksana tersebut tidak seharusnya memberikan ikat jamin.

[Rayuan dibenarkan]

Cases referred to:
Public Prosecutor v. Chew Slew Luan [1982] 2 CLJ 3541[1982]2 MLJ 119 ***(foll)***
Yap Sooi Kim v. Public Prosecutor [1989] 2 CLJ 2421 [1989]! MLJ 44 ***(refd)***
Leong Siew Hoong v. Public Prosecutor [1988] 1 MLJ 396 ***(refd)***
Loy Chin Heiv. Public Prosecutor [1982] 1 CLJ 371[1982] 1 MLJ 31, 32 ***(refd)***

Legislation referred to:
Criminal Procedure Code (FMS Cap. 6) s. 389
Dangerous Drugs Act 1952, ss. 39A(2), 41B(1) & (2)

For the appellant - Stanley Isaacs, SFC
For the respondent - Tan Hock Chuan; M/s. Kam Woon Wah & Co.

JUDGMENT

Gunn Chit Tuan CJ (Malaya):
Leong Ying Ming ("the respondent") was charged for an offence under s. 39A(2) of the Dangerous Drugs Act 1952, ("the Act") at the Sessions Court, Bentong, Pahang Darul Makmur. That section provides for increased penalty where the subject matter is the prescribed amount of certain dangerous drugs and reads as follows:

> 39A (2) Every person found guilty of an offence againstthis Actwhere the offence is not punishable with death and where the subject matter of the offence is -
> (a) 5 grammes or more in weight of heroin;
> (b) 5 grammes or more in weight of morphine;

(c) 5 grammes or more in weight of monoacetylmorphines;
(d) a total of 5 grammes or more in weight of heroin, morphine and monoacetylmorphines or a total of 5 grammes or more in weightof any two of the said dangerous drugs;
(e) 15 grammes or more in weight of cocaine;
(f) **50 grammes or more in weight of cannabis;**
(g) 50 grammes or more in weightof cannabis resin;
(h) a total of 50 grammes or more in weight of cannabis and cannabis resin;
(i) 250 grammes or more in weight of raw opium;
(j) 250 grammes or more in weight of prepared opium;
(k) a total of 250 grammes or more in weight of raw opium and prepared opium; or
(l) 750 grammes or more in weight of coca leaves,

shall, instead of being liable to the punishment provided for that offence under the section under which the person has been so found guilty, be punished with imprisonment for life or for a term which shall not be less than five years, and he shall also be punished with whipping of not less than ten strokes.

(Emphasis provided)

The respondent, who was charged with possession of 50.84 grammes of ganja, applied for bail which was refused by the Sessions Court Judge, as he was of the view that the offence was not bailable under s. 41B of the Act which reads as follows:

41B. (1) Bail shall not be granted to an accused person charged with an offence under this Act -

(a) xxx
(b) where the offence is **punishable with imprisonment for more than five years;**
(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grantbail to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

(Emphasis provided)

The respondent then made an application for bail to the Kuantan High Court pursuant to s. 389 of the Criminal Procedure Code (FMS Cap. 6) and the learned Judge there allowed his application and granted bail of RM10,000 in two sureties.

The Public Prosecutor filed an appeal to the Supreme Court on 10 April 1990, and in his petition of appeal dated 28 July 1990, he set forth the following grounds of appeal:

1. Yang Arif Hakim telah tersilap dari segi undang-undang dalam mengintepretasikan s. 41B Akta Dadah Berbahaya 1952 (Akta 234).
2. Yang Arif Hakim telah tersilap dari segi undang-undang dalam memutuskan bahawa s. 41B(l)(b)Akta Dadah Berbahaya 1952 (Akta 234) adalah tidak terpakai di dalam kes yang dirayu.
3. Yang Arif Hakim telah tersilap dari segi undang-undang dalam memutuskan bahawa kesalahan di bawah s. 39A(2) bukanlah merupakan jenis-jenis kesalahan yang dimaksudkan di bawah s. 41B(l)(b) Akta Dadah Berbahaya 1952 (Akta 234).

The only issue for the determination of the Supreme Court, as well as for the High Court, was whether an offence under s. 39A(2) of the Act is a bailable offence.

Before us, Dato' Stanley Isaacs for the Public Prosecutor referred to sub-section 2 of s. 41B of the Act and submitted that in considering the issue raised in this appeal, the Court should ignore any reference to any other written law or statutes, especially Chapter XXXVIII of the Criminal Procedure Code concerning bail. He also referred to Public Prosecutor v. Chew Siew Luan [1982] 2 MLJ 119, in which case the former Federal Court held that the provisions regulating the granting of bail under the Act must be construed in the context of the Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must ex necessitate yield to the specific provisions of s. 41B of the Act. Counsel contended that in order to determine whether a given offence is bailable or not, it is necessary for the Court to look at the punishment section first and not at the section that governs bail. He contended that it was the discretion of the trial Court at the time of sentencing an Accused for an offence under

s. 39A(2) of the Act to decide whether to impose life imprisonment or a lesser term. He pointed out that at the stage when bail is considered, it is not certain what the sentence would be and all the Court knows is that the Accused is liable to punishment as provided for an offence under that section. He also pointed out that the word "punishable" is used in s. 41B(1) of the Act and the fact remains that at that stage of the proceedings the Accused in this case was punishable with a sentence of more than 5 years so that it comes squarely within the classification of s. 41B(l)(b). Counsel submitted that the words are clear and unambiguous and do not call for alternative discussion.

Dato' Stanley Isaacs then referred us to *Yap Sooi Kim v. Public Prosecutor* [1989] 1 MLJ 44, in which case Anuar J. held that the operative words under s. 41B(l)(b) are "punishable with imprisonment". That phrase in, the view of Anuar J. means the power of punishment which the Court has under the law and not the punishment which the Court may choose to impose. Counsel pointed out that the learned Judge in this case did consider the views of Anuar J. in *Yap Sooi Kim v. Public Prosecutor [1989]* 1 MLJ 44 but gave no convincing reason for not following them.

Reference was also made by Counsel to *Leong SiewHoongv. Public Prosecutor* [1988] 1 MLJ 396, in which case K.C. Vohrah J. also had the occasion to deal with an almost similar matter. In that case, the issue was whether the Magistrate was right in law to refuse bail to an Accused who was charged with an offence of trafficking in heroin with a gross weight of 37 grammes. The argument in that case was that the nett weight of heroin, after the chemist's report is received, could well be below the amount of 5 grammes and that therefore the offence fell under s. 39A(1) of the Act, and that the Accused was therefore not caught by the section which restricts bail under s. 41B of the Act. In that case, K.C. Vohrah J. also held that in considering whether the Accused was entitled to bail, the crucial question was what is the offence the Accused is charged with, and not what the nett weight of the drugs might eventually be, to bring the case within a different section of the Act.

Counsel also referred us to *Loy Chin Hei v. Public Prosecutor* [1982] 1 MLJ 31, 32, in which case Wan Yahya J. (as he then was) held that the restriction on bail under s. 41B of the Act is absolute and neither the Court below nor the High Court has power to admit to bail any person charged with an offence punishable with death or more than 5 years' impris onment or even for lesser terms when the Public Prosecutor certifies that it is against the public interest to allow bail.

Mr. Tan Hock Chuan, Counsel for the respondent, submitted that the said offence did not fall under s. 41B of the Act and that the Court should resort to the general law. He stated that the High Court has an unfettered discretion under s. 389 of the Criminal Procedure Code to grant bail in any case and contended that in the instant case, the learned Judge of the High Court had exercised his discretion properly when he granted bail to the respondent.

We have perused the notes of proceedings recorded in the Court below and note that unfortunately the Federal Court case *of Public Prosecutor v. Chew Siew Luan* [1982] 2 MLJ 119 was not brought to the learned Judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s. 41B(l)(b) are clear and that the words "punishable with imprisonment for more than five years" mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to s. 39A(2), we consider that the words "be punished with imprisonment for life or for a term which shall not be less than five years" are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, i.e. five years and one day up to a maximum of imprisonment for life. That being so, an offence under s. 39A(2) of the Act clearly comes within the ban imposed by s.41B(l)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned Judge should not have granted bail in this case.

The appeal of the Public Prosecutor is therefore allowed and the order of the learned Judge is set aside. However, we understood from the Senior Federal Counsel that the respondent in this case had already been acquitted by the Sessions Court and although our ruling would be academic for this case, we have decided to deliver this judgment as a guide for similar cases in the future.

TAN SRI KHOO TECK PUAT & ANOR.
v.
PLENITUDE HOLDINGS SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TUN DATO[1] SERI HJ. ABDUL HAMID BIN HJ. OMAR LP, TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), DATO' HJ. MOHD. EUSOFF CHIN SCJ
[SUPREME COURT CIVIL APPEAL NO. 02-281-92]
23 FEBRUARY 1993

APPEAL: Principles governing an appellate Court's jurisdiction to interfere with a lower Court's findings of fact - Whether there was misdirection of himself by the trial Judge - Whether the trial Judge's conclusion was plainly wrong.

The appellants and the respondent entered into a sale and purchase agreement wherein the appellants agreed to sell and the respondent agreed to buy an estate land at a price of RM47,939,958. The respondent failed to pay the balance of the purchase price within the contractual period and the appellants terminated the agreement and forfeited the deposit.

The trial Court found in favour of the respondent and on appeal the question that arose was whether the appellate Court was entitled to interfere with the findings of the trial Judge.

Held:

[1] There was no misdirection of himself by the learned Judge. The printed evidence showed that the Judge's conclusions were justified.

[2] Sitting without the privilege of the trial Judge who heard and tried the case, it could not be concluded that the learned Judge, who saw and heard the witnesses, was plainly wrong.

[3] There was no grounds to disagree with the learned Judge on his findings of fact based on the evidence adduced and there was no reason for interfering with his judgment.

[Appeal dismissed].

[**Bahasa Malaysia** Translation of Headnote]

RAYUAN: Prinsip-prinsip yang menguasai bidang kuasaMahkamah rayuan untuk campur tangan dalam kedapatan fakta oleh Mahkamah rendah - Sama ada Hakim perbicaraan menyalaharahkan dirinya - Sama ada kesimpulan Hakim perbicaraan adalah jelas salah.